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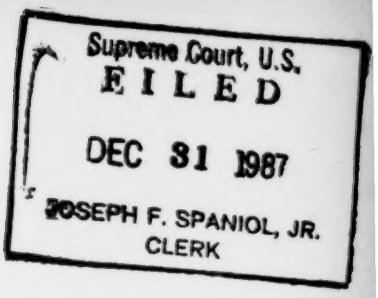

No. 87-_____

IN THE

THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

ALASKA TRAMS CORPORATION, a/k/a
ALASKA TRAMS, INC.,

Petitioner,

v.

ALASKA ELECTRIC LIGHT & POWER, an Alaska Corporation; WILLIAM A. CORBUS; DOES I-XX; and an AERIAL RIGHT-OF-WAY, an Easement 1300 Linear Feet in Length, More or Less,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

A. Lee Petersen, Esq.
LAW OFFICES OF
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Attorney for Petitioner

QUESTIONS PRESENTED

1. Petitioner's complaint was dismissed with prejudice by the trial court because of its untimely response to court ordered production of financial information relating to damages on two of petitioners's thirteen causes of action and after some of the claims had already been dismissed on summary judgment.

Does constitutional due process allow the dismissal with prejudice as a discovery sanction of claims that:

(a) are not related to the untimely produced materials, and/or

(b) have been dismissed previously on summary judgments, in one case prior to any discovery motions?

2. The appellate court affirmed the sanction of dismissal and declined to re-

view the substantive issues by holding that the sanction was not an abuse of discretion and that the tardily produced financial information was not merely relevant to the two damages claims but was essential to the other party's overall trial strategy.

(a) Is one party's financial ability to carry out litigation relevant and discoverable information?

(b) Does constitutional due process or the equal protection clause allow a party's complaint to be dismissed for untimely production of such financial information?

(c) Is due process violated when a discretionary sanction at trial level precludes appellate review of unrelated substantive issues?

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STATUTES AND RULES

STATEMENT OF JURISDICTION

The petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment Opinion of the Supreme Court of the State of Alaska filed in these matters.

The Supreme Court of Alaska entered a judgment on October 2, 1987, in the case of Alaska Trams v. Alaska Electric Light and Power, 743 P.2d 350 (Alaska 1987). Appendix at A1.

Petitioner relies on this Court's jurisdiction under 28 U.S.C. § 1257(3) by timely filing this petition in accord with 28 U.S.C. § 2101.

APPLICABLE CONSTITUTIONAL PROVISION

This case involves Amendment XIV, Section 1 to the United States Constitution which provides:

> . . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Alaska Trams [ATI] is a family-run business in Juneau, Alaska. Its goal is to build a resort on top of Mt. Juneau with a scenic tramway connecting the resort with the town of Juneau. Tourism is a growing, environmentally safe and renewable industry in Juneau where international cruise ships bring thousands of tourists to visit each summer. There is at present no access to the top of the 3,600-foot Mt. Juneau, which sits behind the town and has a commanding view of the surrounding mountains, glaciers, islands and waterways.

ATI owns patented federal mining claims on the top and the sides of Mt. Juneau. In 1976, ATI signed a contract with Alaska Electric Light & Power [AELP] to purchase 2.5 acres near downtown Juneau to serve as the "tramway terminal" location. ATI had bargained for and understood the purchase included an essential aerial easement over adjacent AELP lands. AELP denied the conveyance of that easement, later offering to sell it for an amount much greater than the amount ATI paid for the terminal site.

ATI filed suit on August 6, 1984, in the state superior court alleging, inter-alia, breach of contract, tortious interference, mistake and fraud and included a complaint for condemnation. ATI sought equitable relief, damages and/or the right to condemn the needed aerial ease-

ment. The following is a description of the discovery war in which ATI rapidly became involved.

On August 16, 1984, AELP served ATI's president, Chuck Keen, with a Notice of Deposition and a 31-page Subpoena Duces Tecum. AELP answered ATI's complaint on August 24, 1984. Chuck Keen's Deposition was held on August 28, 1984, at which time, in AELP's words, ATI "produced a considerable volume of paper in response to the Subpoenas; however, it refused to produce financial information or to identify the categories to which these materials were responsive." (R. 1263).[1]

AELP served ATI its First Request

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1. References "R. ____" are to the Record on Appeal to Alaska supreme court which has not been certified and transmitted at this time.

for Production on October 12, 1984. ATI objected in writing on November 14, 1984, noting its compliance with the identical Subpoena Duces Tecum, and complaining of overly broad and burdensome requests, financial interference, and inability to comply. AELP moved to compel production on December 18, 1984.

On November 26, 1984, prior to AELP's Motion to Compel Production, the trial court denied ATI's Motion for Summary Judgment on the issue of its power of eminent domain. The trial court established as the law of the case that ATI did not have the right or power to exercise eminent domain.

The trial court granted AELP's Motion to Compel on April 11, 1985, noting ATI's ability to file for protective orders, but it did not set a time for

compliance. AELP moved for sanctions, requesting issue preclusion, on April 25, 1985. On May 3, 1985, the trial court set a deadline of ten days for ATI's compliance with its order of April 11.

ATI then moved for a protective order[2] on May 13, 1985. ATI noted its compliance with the April 11 order "with the exception of current information regarding ongoing financing of the project." ATI stated: "A protective order is now being sought to limit discovery of this sensitive financing until ninety (90) days before the discovery cut-off at which time all requested financial infor-

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2. ATI was convinced that AELP's president had and would contact prospective lending institutions and discourage their participation in the project. ATI submitted one such letter from AELP as evidence.

mation will be voluntarily produced." (R. 1249).

AELP moved for the sanction of dismissal on June 6, 1985. On June 7, ATI produced 394 more pages of documents, with an index. The trial court denied ATI's motion for a protective order on June 18, 1985, stating "ATI's overly broad Motion for Protective Order is denied. AEL&P is ordered, however, not to disclose financial information produced by ATI except insofar as is necessary to prepare and present AEL&P's case." (R. 1293).

The trial court ruled on AELP's motion for dismissal sanctions on July 8, 1985, giving ATI until the close of business on the day of August 27 to comply with AELP's discovery request and ordering AELP to further specify its discovery

requests. On August 27, ATI produced some five hundred pages and documents and further written responses to AELP's requests.

On August 28, 1984, the trial court granted AELP's Motion for Partial Summary Judgment. It dismissed the tort and contract causes of action that sought monetary damages.

On September 4, ATI's Alaska counsel[3] invited AELP's counsel to attend a production session in a separate matter involving Chuck Keen for the express purpose of seeing if there were any other

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3. ATI was represented by several different attorneys throughout the litigation including two from California, a jurisdiction that apparently has different "ground rules" regarding discovery sanctions. See, e.g., Carroll v. Abbott Laboratories, 654 P.2d 775 (Cal. 1982) (two motions to vacate dismissal granted over a five year pre-trial period).

documents AELP might be interested in copying. AELP filed another Motion to Dismiss on September 5. AELP's attorney attended the production session held on September 12 and copied a relatively small amount of material that had recently been created by ATI or had not been produced through inadvertence or confusion from the two cases in which Mr. Keen was involved.

The trial court ruled on AELP's dismissal sanction motion on November 6, 1985. Appendix at A28. It had previously dismissed ATI's causes of action for breach of contract, tortious interference and eminent domain, in two prior summary judgment proceedings, November 26, 1984, and August 28, 1985. On November 6, 1985, the trial court granted AELP's Motion for Summary Judgment on the

remaining five causes of action, i.e., specific performance and reformation. Then, the trial court went on to dismiss the whole complaint with prejudice as a discovery sanction for the "willful failure" to produce documents allegedly relating to damages stemming from causes of action already disposed of on summary judgment.

ATI appealed to the state supreme court, raising five issues. The state court ruled against ATI on the issue of judicial qualification of the trial judge and the issue of dismissal as a discovery sanction. It did not address the contract issues, the tort issue or the issue of eminent domain by virtue of its affirming the discovery sanction dismissal of the whole complaint with prejudice.

REASONS FOR ALLOWANCE OF WRIT

This petition presents several concise questions of law respecting the constitutional due process limits on modern discovery practice. These are discussed below and they need to be answered. In the ten years following this Court's launching of the deterrence theory of discovery sanctions, National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976), the availability of merit-avoiding sanctions has taken on new meaning in a litigant's overall strategy.[4]

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4. See W. Brazil, Model Rules for Case Management, 4 Am. Bar Found. Res. J. 873, 880-881 (1981) (survey reveals overdiscovery, harrassment, misuse of information as major problems in current discovery practice).

-A-

The trial court held that dismissal of ATI's complaint was supported by the want-of-merit presumption stated by the Court in Hammond Packing Co. v. Arkansas, 212 U.S. 322 (1908). This Court has recently explained the rule of Hammond Packing: "the [dismissal] sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites, 456 U.S. 694, 708 (1982). Since the trial court and AELP agreed that the untimely produced evidence related only to damages for two of thirteen claims, (Appendix at A39), the dismissal, and its affirmation, are directly contrary to controlling federal law. "Due process is violated only if the behavior of the

defendant will not support the Hammond Packing presumption." Id. at 707.

On appeal, the state supreme court considered and rejected ATI's argument that "the sanction should have been limited to those claims actually involved." Appendix at A19. The state supreme court did not address constitutional due process, or Hovey v. Elliott, 167 U.S. 409 (1897), and Hammond Packing, supra, in its opinion despite their mention in the Appellant's brief and the trial court's Memorandum and Order of November 6, 1985. Appendix at A33-40. Concern for constitutional due process is noticeably absent from the two Alaska cases cited by the state supreme court in its opinion, Dade v. Child Support Enforcement Div., 725 P.2d 706 (Alaska 1986), and Hawes Firearms Co. v. Edwards,

634 P.2d 377 (Alaska 1981).[5]

One reason, then, to grant this petition is to reaffirm the presence of constitutional due process in modern discovery practice. Since the choice of sanctions is discretionary, due process demands that the sanction fit the discovery problem at issue. Compagnie des Bauxites, supra. This petition presents the Court with several ways to examine and define that "fit" by including the following situations:

1. Dismissal of a claim that was ruled on prior to discovery motions;

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5. Litigation-ending sanctions in Alaska hinge on a determination of willfulness, which is defined as a conscious intent to impede discovery. Hawes, supra at 378. Both Dade and Hawes involved issue preclusion sanctions more closely fitting the Hammond Packing rule.

2. Dismissal of claims already dismissed on summary judgments;

3. Dismissal of claims not at all related to the evidence sought; and,

4. Dismissal of complaint with prejudice after substantial and then full compliance with discovery requests.

Here, unlike other areas of the law, the elements of the conduct that warrant the most severe penalties in the spectrum of sanctions are not clear. This Court's statements are needed to define and assure baseline constitutional due process.

-B-

A second important reason why this petition should be granted is the appellate court's expansive definition of dis-

coverable matters, which includes financial information relating to damages as being essential to overall trial strategy. In other words, AELP could properly discover ATI's financial resources and decide whether to proceed to trial on the merits or to stall the litigation until ATI's resources ran out. This is in flagrant disregard of Rule 1 of both the Alaska and Federal Rules of Civil Procedure:[6] "These rules [They] shall be construed to secure the just, speedy, and inexpensive determination of every action [and proceeding]." More important, this definition condones an invasion of privacy, and it limits the availability of the right to a judicial determination on

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6. Brackets indicate the language used in Alaska R. Civ. P. 1.

the merits of a case on the basis of financial ability. The compelled disclosure of financial ability will result in resolution of many disputes not through adjudication but through economic duress. As this Court has noted: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956).

-C-

In addition, should the Court choose, this petition presents several other issues and opportunities to clarify current discovery problems. First, it would allow the Court to flesh out what is now known as the deterrence theory of discovery sanctions, stemming from National Hockey League, supra. As it

stands, the state supreme court has affirmed an arbitrary and irrational sanction which can only encourage substantial motion practice aimed at resolution of disputes through sanctions.

Second, the Petitioner's case involved extremely broad and virtually unanswerable requests for production, where Petitioner substantially complied with most of the requests. The trial court did not inspect the thousands of documents produced or determine the actual possibility of answering AELP's requests.[7] This was pointed out to the appellate court below as an important

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7. The trial court adopted AELP's contention that "some of the specified material requested, which it believes to be in existence, has still yet to be disclosed." Appendix at A31, (emphasis added).

factor in determining willfulness as well as in the choice of sanctions. See Societie Internationale v. Rogers, 357 U.S. 197, 203 (1957).

Third, since the trial court had referred to ATI's project as "Catherine the Great's Potemkin village" in a written memorandum and was subsequently asked to disqualify himself on ATI's motion,[8] the case questions need for an independent judicial officer to manage discovery or to impose litigation ending sanctions. This is an especially important consideration where proof on issues of compliance, noncompliance and willfulness is based solely on the representations of the parties' counsel.

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8. ATI moved twice to disqualify the trial judge for cause twice.

Finally, the dismissal with prejudice of Petitioner's complaint was in effect a super-sanction. It placed the state created right to appellate review on the merits at the mercy of the low standard of review for the discretionary acts of the trial court. Due process certainly applies to a state created right to appeal. Griffin v. Illinois, supra. The question is whether a discretionary discovery sanction at the trial level can limit the right to appeal on the merits.

CONCLUSION

This petition contains a substantial federal constitutional question of due process of law[9] in an area that is funda-

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9. A cause of action is property (Footnote continued)

mental to the right and consent of parties to settle their disputes through the judicial process. Petitioner was denied its state created right to an appeal on the merits, AS 22.05.010(a), (Appendix at A45), by a trial court decision directly in conflict with the decisions of this Court interpreting the due process clause. This denial of due process was affirmed by the state supreme court in a manner further disrespectful of the Fourteenth Amendment. This situation

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protected by the Fourteenth Amendment, Logan v. Zimmerman Brush Co., 455 U.S. 422, 429 (1982); Rule 37 is limited by constitutional due process, Societie Internationale v. Rogers, supra, at 209; the offical actions of state courts and judicial officers are actions of the State in the meaning of the Fourteenth Amendment, Shelley v. Kraemer, 344 U.S. 1, 14 (1947); and, the federal guaranty of due process extends to the acts of the state judiciary. Id., at 15.

warrants correction.

"[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." Hickman v. Taylor, 329 U.S. 495, 507 (1947). Those boundaries are currently in need of definition. This petition presents the Court with a unique and straightforward opportunity to define the boundaries and limits that due process places on discovery. To do so would not only affirm the Constitution, but would go a long way toward stemming the current trend of overdiscovery and the offensive and arbitrary use of sanctions.

It now makes sense to a lot of attorneys to frame broad and virtually unanswerable discovery requests and start moving for sanctions as a matter of course. This may or may not be desirable. It does, however, place substan-

tial constitutional responsibility on the discretionary choice of just and meaningful sanctions. The meaningful choice of sanctions is essential to an effective system of deterrence. Irrational sanctions breed disrespect and contempt for the judiciary and the court system as a forum for dispute resolution. In this case, the irrational imposition of the dismissal sanction also violated Petitioner's right to due process of the law.

DATED this 29 day of December, 1987, at Anchorage, Alaska,

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Phone: (907) 276-8330

Attorney for Petitioner

APPENDIX

THE SUPREME COURT OF THE
STATE OF ALASKA

ALASKA TRAMS CORPORATION, a/k/a ALASKA TRAMS, INC.,	)	File No. S-1360
Appellant,	)	O P I N I O N
ALASKA ELECTRIC LIGHT & POWER, an Alaska Corporation; WILLIAM A. CORBUS: DOES I-XX; and an AERIAL RIGHT-OF-WAY, an Easement 1300 Linear Feet in Length, More or Less,	)	(No. 3229 - October 2, 1987)
Appellees.	)	

Appeal from the Superior Court of the State of Alaska, First Judicial District, Juneau, Rodger W. Pegues and Henry C. Keene, Jr., Judges.

Appearances: Bruce A. Moore and A. Lee Petersen, Law Offices of A. Lee Petersen, Anchorage, for Appellant. John F. Clough, III, Leon T. Vance, and Ann G. Vance, Faulkner,

Banfield, Doogan & Holmes, Juneau, for Appellees.

Before: Rabinowitz, Chief Justice, Burke, Matthews, Compton and Moore, Justices.

BURKE, Justice.

This appeal arises from the dismissal of appellant Alaska Trams's action against appellees Alaska Electric Light & Power, William A. Corbus, and certain real property (hereinafter AELP, collectively) to secure an aerial easement required for the construction of a tramway.[1] Because we are unable to say that the trial court abused its discretion in dismissing the action, the judgment of the superior court is affirmed.

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1. William A. Corbus and Does I-XX are employees or agents of AELP.

I

For several years, Alaska Trams had wanted to build a tramway between the City of Juneau and the top of Mt. Juneau as part of a resort/hotel complex. In preparation for the anticipated construction, Alaska Trams contacted AELP to purchase certain real property to be used as a base for the tram terminal and hotel. Alaska Trams also wanted to obtain an aerial easement to permit the tramway to cross AELP's adjacent property.

Negotiations were consummated in November, 1976 when Alaska Trams and AELP signed a contract for the sale of 2.5 acres near downtown Juneau. The sale was closed in December, 1976. The contract did not mention an aerial easement over adjacent AELP property. It is this

omission which forms the basis of this appeal.

Roughly nine months later, in August, 1977, Alaska Trams sent a letter to AELP in which Alaska Trams indicated that it was aware that the contract did not contain explicit mention of the easement in question. The letter also indicated, however, that it was Alaska Tram's belief that "this was just an oversight in typing." This letter was the opening salvo: between 1977 and 1984, Alaska Trams sent AELP no fewer than twelve letters, all threatening legal action if AELP did not immediately convey the aerial easement. AELP did not convey the easement; Alaska Trams finally filed suit on August 6, 1984, seeking conveyance of the easement or damages.

In January, 1985, Alaska Trams filed a motion to disqualify Judge Pegues for cause. Judge Pegues denied the motion. The motion was referred to an independent judge, Judge Keene, for a ruling pursuant to AS 22.20.020(c).[2] Judge Keene also denied the motion.

Ultimately, all of Alaska Trams' causes of action were dismissed on AELP's various summary judgment motions. In addition, the trial court dismissed Alaska Trams' action with prejudice as a

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2. AS 22.20.020(c) provides in part:

> If a judicial officer denies disqualification the question shall be heard and determined by another judge assigned for the purthe next higher level of courts or, if none, by the other members of the supreme court.

sanction under Civil Rule 37(b)(2)[3] for what the trial court termed Alaska Trams' unexcused and willful refusal to comply with discovery orders. This appeal followed.

II

The first issue we address concerns Judges Pegues' and Keene's refusal to disqualify Judge Pegues after he was challenged for cause. Alaska Trams argues that both Judge Pegues and Judge Keene based their determinations solely

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3. Alaska R. Civ. P.37(b)(2) provides in part:

> If a party or an officer, director, or managing agent of a party
>
> . . . fails to obey an order to provide or permit discovery,

(Footnote continued)

upon AS 22.20.020(a)(6),[4] rather than upon the recusal considerations discussed in Alaska Code of Judicial Conduct Canon

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> . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (C) An order . . . dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

4. AS 22.20.020(a)(6) provides:

> A judicial officer may not act as such in a court of which the judicial officer is a member in an action in which . . . .
>
> (6) the judicial officer feels that, for any reason, a fair and impartial decision cannot be given.

Subsections (1)-(5) of AS 22.20.020(a) involve objective measures of cause for disqualification, such as personal involvement in a case, as opposed to the subjective measure relevant here.

3(C)(1)(a).[5] Alaska Trams asserts that, had Canon 3(c) been considered, Judge Pegues would have been disqualified because of the reasonable inference that Judge Pegues was biased against Alaska Trams. This argument is supported by citation to a number of instances of alleged bias, including counsel's generalized feelings of unfair treatment, Judge Pegues' past involvement in environmental protection movements, unspecified sarcastic comments made by Judge Pegues in another proceeding, and a comment contained in a memorandum opinion in

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5. Alaska Code of Judicial Conduct Canon 3(C)(1) provides:

> A judge should disqualify himself in a proceeding in which his

(Footnote continued)

which Judge Pegues denied Alaska Trams' motion for preliminary injunction.[6]

In making this argument, Alaska Trams misses an important point: the trial court explicitly considered the recusal standard found in Canon 3(C) and determined that recusal under that standard was inappropriate. Thus, Alaska Trams' argument alleging that the judge

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> impartiality might reasonably be questioned, including but not limited to instances where:
>
> > (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . .

6. In the order denying the preliminary injunction, Judge Pegues referred to "Alaska Trams' imminent, alleged irreparable injury." He then noted that:

(Footnote continued)

failed to consider the ethical canon is without merit.[7]

The remaining question is whether Judges Pegues' and Keene's refusal to

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> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings; . . .
>
> The court uses the modifier "alleged" for a reason. There is something about Alaska Trams' proposal that invokes the memory of Catherine the Great's Potemkin villages.

The court later explained this comment as an attempt at "judicial humor."

7. The recusal provision found in Canon 3(C)(1)(a) and the reasons requiring disqualification set forth in AS 22.20.020(a)(6) are related, but somewhat different. We have said that where a judge's refusal to disqualify himself is "patently unreasonable," we will reverse, but that in cases "[w]here only the appearance of partiality is involved" we will require a "greater showing" for reversal. Amidon v. State, 604 P.2d 575, 577 (Alaska 1979).

disqualify Judge Pegues constituted an abuse of discretion. Amidon v. State, 604 P.2d 575, 577 (Alaska 1979). Such a refusal is to be accorded great weight and will be reversed on appeal only when it is evident that reasonable persons could not rationally come to the same conclusion on the basis of known facts. (Alaska 1985). In this regard, "[i]t should be kept in mind that a judge has as great an obligation not to disqualify himself, when there is no occasion to do so, as he has to do so in the presence of valid reasons." Amidon, 604 P.2d at 577.

Applying these principles to the present action, we are unable to say that the refusal to disqualify Judge Pegues was an abuse of discretion. A review of the record as a whole fails to reveal any

unfairness in the conduct of the trial and the alleged instances of bias, considered either collectively or individually, fail to demonstrate any specific bias or generalized pattern of bias. We, therefore, affirm Judges Pegues' and Keene's refusal to disqualify Judge Pegues for cause.

III

In its memorandum opinion, the trial court dismissed Alaska Trams' complaint with prejudice pursuant to Civil Rule 37(b) for failure to comply with discovery orders. The court stated, in part:

> The court previously issued orders on April 11, 1985, and May 3, 1985, requiring Alaska Trams to make discovery as requested by [AELP]. On July 8, 1985, this court ordered Alaska Trams to make discovery by August 27, 1985, of the docu-

> ments to be requested by [AELP] by July 28, 1985. The court granted this additional time in order for [AELP] to restate its discovery requests with still greater specificity to avoid any further claims of confusion by Alaska Trams. Alaska Trams was expressly warned that failure to comply with the order or to show to the court its inability to comply by August 27, 1985, would result in the complaint being dismissed with prejudice.
>
> . . . .
>
> This court finds, . . . that Alaska Trams willfully and inexcusably failed to comply with this court's order after being warned of the dire consequences. While litigation-ending sanctions should be imposed sparingly, they are necessary here to deter just the kind of conduct that Alaska Trams has purposely decided to employ. Accordingly, [AELP's] motion to dismiss with prejudice is granted.

Alaska Trams argues that the dismissal sanction was improper because the court

erroneously concluded that Alaska Trams willfully failed to comply with its discovery orders and because the sanction was excessive in light of the material actually withheld.[8]

Civil Rule 37(b) authorizes the trial court to impose a wide range of sanctions on a party who fails to comply with discovery orders. Dade v. State, Child Support Enforcement Division ex rel. Lovett, 725 P.2d 706, 708 (Alaska

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8. Alaska Trams also argues that the court's discovery orders were "unlawful," but it does not explain why and we are unable to perceive a basis for the allegation. Consequently, we do not consider this part of Alaska Trams' argument. E.g., Forquer v. State, Commercial Fisheries Entry Comm'n, 677 P.2d 1236, 1238 n.2 (Alaska 1984); Craig Taylor Equipment v. Pettibone Corp., 659 P.2d 594, 596 n.1 (Alaska 1983); State v. O'Neill Investigations, 609 P.2d 520, 528 (Alaska 1980).

1986). The purpose of the sanctions is to encourage discovery and deter noncompliance by allowing trial judges to enforce their discovery orders, and to ensure that parties will not profit from their own willful failure to comply with such orders. Hawes Firearms v. Edwards, 634 P.2d 377, 378 (Alaska 1981). Although sanctions which end litigation are generally disfavored and may even constitute a denial of due process, the imposition of such sanctions is justified if the failure to comply with a discovery order is willful. Hawes Firearms, 634 P.2d at 378. "Willfullness" is defined as a conscious intent to impede discovery. Dade, 725 P.2d at 708; Hawes Firearms, 634 P.2d at 378. Once noncompliance is shown, the burden is upon the

noncomplying party to prove that its failure to provide discovery was not willful. Dade, 725 P.2d at 708; Hawes Firearms, 634 P.2d at 378. The choice of a particular sanction is committed to the broad discretion of the trial court and will not be set aside absent an abuse of discretion. Dade, 725 P.2d at 708; Hawes Firearms, 634 P.2d at 378.

While Alaska Trams admits that it did not fully comply with the discovery order in this case, it appears to argue that the imposition of any sanction was improper because there was substantial compliance before the discovery deadline, full compliance was obtained after the deadline had passed, and its noncompliance was not willful. The trial court

considered and rejected these arguments, stating:

> Alaska Trams admits that some accounting and banking records requested by [AELP] were not produced until September 11 or 12. Alaska Trams argues that any prior nonproduction of materials previously in existence was inadvertent, not willful, and "was due to confusion resulting from volume and from the fact that the great majority of the records of Alaska Trams were already in the custody of the court." . . . While it is possible, although just barely, that counsel for Alaska Trams was himself personally unaware of the existence and location of the additional materials, it is totally incredible under the circumstances that his client, Chuck Keen, was unaware of them. The only reasonable conclusion, in the absence of a credible explanation -- and none has been offered -- is that Keen willfully withheld the materials until their discovery was compelled by the events in an unrelated case.

We agree. Because Alaska Trams admits that it did not fully comply with the trial court's discovery orders by the stated deadline, it bore the burden of demonstrating to the court that its noncompliance was not willful. This it clearly has failed to do. Nor will the fact that Alaska Trams ultimately produced the requested materials remove the taint of its willful disregard of the trial court's production orders. See Dade, 725 P.2d at 707 n.1. We, thus, find no abuse of discretion in the trial court's imposition of a Civil Rule 37(b) sanction.

Alaska Trams also argues that the sanction actually imposed was excessive in light of the nature of the documents withheld and the issues to which they did

or did not relate. In brief, we understand Alaska Trams to be arguing that because the materials withheld related primarily to damages issues on only certain of its tort claims, dismissal of the entire case was excessive; the sanction should have been limited to those claims actually involved.

While there certainly may be cases where outright dismissal would be an inappropriate sanction because of the trivial or incidental nature of the materials in relation to the overall action, we do not believe this to be a case of trivial noncompliance. The fact that an action includes issues other than damage issues does not mean that damages are not important; indeed, they are often of primary importance. Withholding ma-

terials relating to a party's damages may seriously prejudice the adverse party by making it difficult or impossible to adequately assess the strength of the opponent's case, thereby leaving the opponent in a weakened position for settlement negotiations or other purposes. Thus, far from being incidental, the withheld materials in this case could be viewed as essential to the formulation of AELP's overall trial strategy. In such a case, where the noncompliance relates to substantial, as opposed to incidental, materials our inquiry must focus upon the sanctioned party's behavior. Cf., Diapulse Corp. of America v. Curtis Publishing, 374 F.2d 442, 446-47 (2d Cir. 1967) (dismissal of libel complaint justified where sanctioned plaintiff exhibited fla-

grant disregard for rules of discovery even though withheld material related only to issue of truth).

AELP's first formal request for production was served on Alaska Trams on October 12, 1984. AELP contended that the materials produced by Alaska Trams in response to this request were not complete because they included no materials relating to the ownership or financing of the tramway, no corporate or banking records, and no expenditure or tax information. Alaska Trams objected to these requests on the grounds that they were "overly broad," "burdensome," and "irrelevant." Alaska Trams also indicated that it could not be compelled to produce information pertaining to the financing of the tramway.

On December 14, 1984, AELP moved to compel production of the requested materials. This motion was granted on April 11, 1985. In granting the motion, the trial court specifically indicated that Alaska Trams was free to move for a protective order if it had justifiable concerns pertaining to the wrongful use of the financial information. However, the trial court warned Alaska Trams that it could interpose no further delay in making discovery. Alaska Trams did not move for a protective order but it did inform AELP that it would not provide the requested financial information.

On April 25, AELP moved for sanctions for nonproduction. AELP sought an order establishing the fact that Alaska Trams had no financing for the tram pro-

ject because of the project's inherent defects. Alaska Trams filed no opposition. The trial court did not, however, grant the motion, but instead, on May 3, issued a second production order to be satisfied on or before May 13.

Alaska Trams responded to this order by delivering several documents to AELP. On May 9, it filed a motion for a protective order relieving it of the obligation to produce any financial information until 90 days prior to trial. On June 18, the trial court denied Alaska Trams' "overly broad motion for [a] protective order," but it did provide Alaska Trams some limited protection and ordered Alaska Trams to comply with discovery requests on or before June 28.

Alaska Trams had still not complied

with the discovery requests by July 8, and the trial court imposed limited sanctions, indicating that:

> [Alaska Trams] has until the close of business on August 27, 1985, to comply fully with this order [to produce] or to prove to this court that it does not have the ability to comply. [AELP] shall by July 28, 1985, furnish [Alaska Trams] specifics on the discovery which [Alaska Trams] has failed to make, and if [Alaska Trams] fails to make that discovery by August 27, 1985, its complaint shall be dismissed with prejudice.

AELP complied with the court order in a timely manner. Despite this order, however, Alaska Trams still refused to produce requested materials pertaining to the financial aspects and ownership interests of the tramway project. These materials had been requested more than a year previously; Alaska Trams did not

file any valid objections to production or make any showing that it could not comply by the specified deadline.

On September 5, AELP moved to dismiss Alaska Trams' action for failure to comply with the trial court's July 8 production order. On September 11, Alaska Trams invited AELP's counsel to attend a production of document session the next day in an unrelated case, Craine v. Keen, No. 1JU-83-554 Civ., and at that time most of the materials requested for the present action were finally produced. The trial court dismissed the complaint on November 6.

Thus, in this case, the trial court issued four separate production orders regarding the same materials over the course of fourteen months, imposed non-

litigation ending sanctions, and warned Alaska Trams that continued failure to produce would result in dismissal. Even after this explicit warning, however, Alaska Trams refused to produce the requested materials and provided no credible explanation for its recalcitrance. In the face of such obstinate and flagrant disregard for the court's orders and the rules of discovery, we are unable to say that the trial court's dismissal was unjustified or without reason. Accordingly, the trial court's order dismissing Alaska Trams' action with prejudice cannot be considered an abuse of discretion and is affirmed.

IV

Because of the disposition above, we

need not consider Alaska Trams' other arguments.[9] The judgment of the trial court is AFFIRMED.

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9. Alaska Trams also appealed the trial court's summary judgments in favor of AELP on its contract based claims, its equitable claims, its tort claims, and its condemnation claim.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

ALASKA TRAMS CORPORATION, a/k/a ALASKA TRAMS, INC., Appellant,	
ALASKA ELECTRIC LIGHT & POWER, an Alaska Corporation; WILLIAM A. CORBUS: DOES I-XX; and an AERIAL RIGHT-OF-WAY, an Easement 1300 Linear Feet in Length, More or Less, Appellees.	Case No. 1JU-84-1469

MEMORANDUM DECISION AND ORDER

I. Motion for Summary Judgment.

AEL&P has moved for summary judgment on the five remaining causes of action in this case. The causes of action are for:

(1) specific performance based on AEL&P's contract breach; (2) reformation of contract based on mistake; (3) reformation of contract based on fraud; (4) reformation of deed based on mutual mistake; and (5) reformation of deed based on fraud. AEL&P contends all five of these claims are barred by the defense of laches. Alaska Trams disputes the applicability of the doctrine of laches to this case.

. . . .

This court finds that AEL&P has been prejudiced by Alaska Trams' unreasonable delay in bringing this action. Alaska Trams' arguments against applying laches here lack merit.

AEL&P's motion for summary judgment against Alaska Trams on the remaining five claims for equitable relief is, therefore, granted.

II. Motion to Dismiss.

AEL&P has also moved this court for an order dismissing this action with prejudice pursuant to the court's order of July 8, 1985.[1] The court previously issued orders on April 11, 1985, and May 3, 1985, requiring Alaska Trams to make discovery as requested by AEL&P. On July 8, 1985, this court ordered Alaska Trams to make discovery by August 27, 1985, of the documents to be requested by AEL&P by July 28, 1985. The court granted this additional time in order for AEL&P to

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1. Although it is arguable that this motion was rendered moot by the granting of summary judgment, this court will still consider and rule on the motion to dismiss so that, in the event of an appeal, the appellate court will have before it this court's rulings on both motions.

restate its discovery requests with still greater specificity to avoid any further claims of confusion by Alaska Trams. Alaska Trams was expressly warned that failure to comply with the order or to show to the court its inability to comply by August 27, 1985, would result in the complaint's being dismissed with prejudice. AEL&P contends that Alaska Trams failed to comply with the court's order and the complaint should, therefore, be dismissed with prejudice.

AEL&P has adequately demonstrated that not all of the specified materials were produced and that no showing of inablility was made by the prescribed date. AEL&P contends that some of the specified material requested, which it believes to be in existence, has still

yet to be disclosed, e.g., loan applications. It is undisputed that a large amount of the material that had been requested by AEL&P was not made available until September 11 or 12, 1985, and then only as an indirect result of an order issued in another proceeding. On September 4, 1985, counsel for Alaska Trams, Mr. Petersen, and counsel for AEL&P, Mr. Clough, were both present in court at an evidentiary hearing in another civil case in which an out-of-state creditor was trying to enforce a judgment against Mr. Keen, Craine v. Keen, Case No. 1JU-83-554. Keen had been directed to make production of financial information about Alaska Trams at or before the evidentiary hearing. When Keen failed to produce the financial information, Judge Carpeneti

continued the evidentiary hearing until September 12, 1985, and directed Keen to make the financial documents available at or before that time. Mr. Petersen subsequently informed Mr. Clough of when and where Keen would be making his financial records available to the plaintiff in the Craine case and invited Mr. Clough to attend. Mr. Clough attended the production session and, for the first time, was given access to thousands of documents on the financial operations of Alaska Trams. These documents had previously been requested by AEL&P but had never been produced.

Imposing sanctions which end litigation without reaching the merits is generally disfavored and such sanctions should not be imposed merely to punish a

failure to comply with a court order. Hammond Packing Co. v. Arkansas, 212 U.S. 322, 350; 53 L.Ed. 530, 544-45 (1909). Litigation ending sanctions are appropriate in some circumstances, however. In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643, 49 L.Ed.2d 747, 751 (1976), the United States Supreme Court recognized the appropriateness of using litigation ending sanctions "to deter those who might be tempted to such conduct in the absence of such a deterrent."

For a litigation ending sanction to be imposed under Civil Rule 37(b)(2), Alaska Trams must willfully have failed to make the ordered production. Hawes Firearms Co. v. Edwards, 634 P.2d 377, 378 (Alaska 1981). Willfully means "not

mere delay, inability or good faith resistance." Id. Once the court finds that the material available to Alaska Trams was not produced as required by the court's order, Alaska Trams has the burden of proving such nonproduction was not willful. Pew v. Foster, 660 P.2d 447, 449 n.3 (Alaska 1983). Hawes Firearms v. Edwards, 634 P.2d at 378 n.2. Alaska Trams admits that some accounting and banking records requested by AEL&P were not produced until September 11 or 12. Alaska Trams argues that any prior nonproduction of materials previously in existence was inadvertent, not willful, and "was due to confusion resulting from volume and from the fact that the great majority of the records of Alaska Trams were already in the custody of the

court." Attorney for Alaska Trams' Certificate of Counsel, September 22, 1985. While it is possible, although just barely, that counsel for Alaska Trams was himself personally unaware of the existence and location of the additional materials, it is totally incredible under the circumstances that his client, Chuck Keen, was unaware of them. The only reasonable conclusion, in the absence of a credible explanation -- and none has been offered -- is that Keen willfully withheld the materials until their discovery was compelled by the events in an unrelated case.

The fact that discovery was ultimately made does not preclude dismissing Alaska Trams' complaint. In Hawes v. Firearms Co., the Alaska Supreme Court

reviewed the trial court's use of sanctions under Civil Rule 37(b). The defendant had failed to comply with the trial court's order to answer interrogatories and make discovery. The trial court sanctioned the defendant by striking its defenses, which effectively decided the defendant's liability and precluded consideration of any meritorious defense. The defendant answered the interrogatories and made discovery after sanctions were ordered. On appeal, the Alaska Supreme Court upheld the sanctions ordered by the trial court and quoted the following with approval:

> Final production is not determinative. The rule permits a sanction when a party "fails to obey an order." . . . The ultimate, and reluctant, production of documents, more than a year after a legitimate request does

> not absolve [a party] of the charge that it willfully failed to obey a valid court order.

634 P.2d at 380, quoting, State of Ohio v. Arthur Andersen & Co., 570 F.2d 1370, 1374 (10th Cir. 1977). Cert. denied, 439 U.S. 833; 58 L.Ed.2d 129 (1978).

The instant case is analogous to the factual situation in Hawes Firearms Co. Alaska Trams willfully failed to obey repeated orders for discovery as the defendant in Hawes Firearms Co. did. The fact that discovery was not made in Hawes Firearms Co. until after sanctions were imposed does not distinguish the two cases. Alaska Trams willfully disobeyed orders of this court and ultimate discovery was made only after the final deadlines set in this case and then as a result of events in an unrelated case and

not to comply with the order in this case.

The documents which AEL&P finally received at the production session for the Craine case involve the financial status and operations of Alaska Trams. These documents are essential to Alaska Trams' claims that it expended large amounts of money on the tramway project in reliance on AEL&P's promises and, thus, incurred damages. These documents are also essential to AEL&P's claim that Alaska Trams never possessed financing for the tramway project because the project is not economically feasible. Given the nature of the documents that Alaska Trams has been willfully refusing to disclose, it is reasonable for this court to infer that Alaska Trams has no case -- or

at best a very weak case -- on the merits. In Hammond Packing Co. v. Arkansas, the [S]upreme [C]ourt approved a presumption by the trial court that a party's failure to produce documents essential to the case "was but an admission of the want of merit in the asserted defense." 212 U.S. at 351, 53 L.Ed. at 545.

In light of Alaska Trams' repeated willful noncompliance with this court's orders, including willful noncompliance after being expressly warned that continued noncompliance would result in the dismissal with prejudice of the complaint, this court concludes that Alaska Trams' ultimately making discovery after the deadline is irrelevant in determining the appropriateness of sanctions. As already stated, discovery was finally made

not in an effort to comply with this court's order but rather as a result of a court proceeding in an unrelated case.

Additionally, AEL&P asserts that Alaska Trams has also failed to make a complete and full written response to the request for production as required by Civil Rule 34(b) and by the court's July 8, 1985, order. In response, Alaska Trams states that it fully complied by making written responses to AEL&P on three occasions, the most recent being August 27, 1985. The only evidence Alaska Trams has offered in support of its position is a statement by its counsel, A. Lee Petersen's Certificate of Counsel, dated September 22, 1985, and a copy of a response dated November 14, 1984. AEL&P contends that the responses which Alaska Trams did

make were insufficient and did not comply with Rule 34(b). This court concludes that Alaska Trams' response does not adequately support its assertion that it has fully complied with this provision of the July 8, 1985, court order.

This court finds, therefore, that Alaska Trams willfully and inexcusably failed to comply with this court's order after being warned of the dire consequences. While litigation-ending sanctions should be imposed sparingly, they are necessary here to deter just the kind of conduct that Alaska Trams has purposely decided to employ. Accordingly, AEL&P's motion to dismiss with prejudice is granted.

III. Motion for Additional Attorney's Fees.

AEL&P asks for an award of their attorney's fees for work incurred as a result of Alaska Trams' noncompliance with the court's discovery orders. Alaska Trams does not dispute the amount of AEL&P's request but rather disputes AEL&P's entitlement to any award of attorney's fees.

. . . .

CONCLUSION

Summary judgment is granted in AEL&P's favor on all the remaining claims in this case. Additionally, this action is dismissed with prejudice for Alaska Trams' noncompliance with this court's order dated July 8, 1985. AEL&P's motion

for additional attorney's fees is granted. Alaska Trams is ordered to pay to AEL&P $2,440.50 for attorney's fees.

ALASKA STATUTES

Sec. 22.05.010. Jurisdiction. (a) The supreme court has final appellate jurisdiction in all actions and proceedings. However, a party has only one appeal as a matter of right from an action or proceeding commenced in either the district court or the superior court.

(b) Appeal to the supreme court is a matter of right only in those actions and proceedings from which there is no right of appeal to the court of appeals under AS 22.07.020 or to the superior court under AS 22.10.020 or AS 22.15.240.

ALASKA R. CIV. P. 37(b)

(b) Failure to Comply With Order.

(2) Sanctions By Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to

be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claim or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses including the attorney's fees, caused by the fail-

ure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.